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IN THE

Supreme Court of the United States

October Term, 1965
No. 653

ERVIN RAHMOELLER,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the Superior Court of the State of California, in and for the County of Los Angeles.

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Petition for a Writ of Certiorari to the Superior Court of the State of California, in and for the County of Los Angeles.

Petitioner, Ervin Rahmoeller, prays that a writ of certiorari issue to review the judgment of the Superior Court of the State of California, in and for the County of Los Angles, entered in the above-entitled cause on July 22, 1965.

Citations to Opinions Below.

The memorandum of opinion and judgment of the Superior Court of the State of California, in and for the County of Los Angeles, was not reported; however, it is set forth in appendix attached hereto (Memorandum Opinion and Judgment, Superior Court No. CRA 6222, Trial Court No. M 59687).

Jurisdiction.

Petitioner, on January 18, 1965, appeared and entered a plea of not guilty before the Municipal Court of the South Bay Judicial District, County of Los Angeles, State of California; was tried before a jury and found guilty (People of the State of California v. Irvin Rahmoeller, No. M 59687, transcript attached hereto) [Tr. 88].

Petitioner appealed to the Appellate Department of the Superior Court, in and for the County of Los Angeles (Los Angeles County Superior Court No. CRA 6222). Said Appellate Department affirmed the judgment of the court below and entered judgment on July 22, 1965, pursuant to its memorandum opinion and judgment (attached hereto).

Petitioner then duly filed a petition for rehearing and/or certification to the District Court of Appeal on July 28, 1965, and said petition was denied by the Appellate Department of the Superior Court on August 4, 1965. With said denial the petitioner had exhausted all remedies by way of appeal.

Petitioner filed a petition for writ of habeas corpus in the District Court of Appeal of the State of California, Second Appellate District, on September 14, 1965. Said petition was denied on September 24, 1965.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3), petitioner having asserted below and claiming here a denial of his rights, to wit: denial of due process of law, as secured by the Fourteenth Amendment to the Constitution of the United States.

Questions Presented.

1. Whether petitioner is denied due process of law under the Fourteenth Amendment when he is denied the right to introduce evidence in support of his defense that a city ordinance rezoning a pre-existing use is unconstitutional by reason of the fact that the period of time allocated for amoritization was arbitrary and unreasonable bearing no reasonable relationship to the true remaining life of said use.

Statutory and Constitutional Provisions Involved.

1. This case involves the due process clause of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves City of Gardena Ordinance No. 482 (attached hereto).

Statement of the Case.

On November 13, 1958, the City of Gardena enacted Ordinance No. 482 (attached hereto), which in effect provided that after December 1, 1963, it would be unlawful to maintain upon any premises in the City of Gardena any bulls, steers, cows, or other bovine animals of any kind [Tr. 45, 71]. Petitioner, Ervin Rahmoeller, as a lessee, had operated a dairy (cow herd) within the City of Gardena, on premises which had been used for dairy purposes since 1927, and has maintained a herd of cows of approximately 180 in number [Tr. 28, 37-40]. The petitioner was charged with violation of the above ordinance.

At the outset of the trial, the petitioner moved for dismissal of the complaint on the grounds:

1. That the ordinance was unconstitutional in that it was unreasonable, arbitrary and discriminatory;

2. That City of Gardena was attempting to deprive the petitioner of the lawful use of his property without due process of law or adequate compensation for same;

3. That the period of five years, which the Gardena City Council found to be the reasonable remaining period of life for the improvements and the leasehold premises, was too short and unrealistic and arbitrary;

4. That the California State Legislature has adopted a general scheme relating to the entire manufacture, production, operation, marketing and sale of dairy products so as to exclude local regulation regarding same, and that the ordinance in question was void because it attempts to declare to be a public nuisance that which has been preempted by the State [Tr. 3-24, 33-36].

The Court denied the petitioner's motion to dismiss, and the People then introduced the following evidence:

1. That after the date set by the ordinance, to wit, from December 1, 1963, to August 26, 1964, the petitioner maintained a herd of approximately 180 cows upon the premises known as 2013 Redondo Beach Boulevard, in the City of Gardena [Tr. 39, 41-42].

2. A certified copy of the Gardena Municipal Code Ordinance No. 482, introduced as People's Exhibit 4 [Tr. 45].

The People then rested their case [Tr. 46]. Petitioner then moved to dismiss the complaint on the grounds that:

1. The People had failed to establish a *corpus delicti;*

2. This was in fact an action to prosecute a nuisance under the Municipal Code ordinance, which nuisance ordinance had been preempted by the California Penal Code, Sections 370, 371 and 372 [Tr. 47].

The Court denied the petitioner's motion to dismiss [Tr. 47]. The Court further ruled that there would be no evidence introduced by the petitioner regarding whether the dairy was in fact a nuisance or whether or not the remaining pariod of five years, used by the City Council to amortize the assets on the premises, was a reasonable period of time [Tr. 47]. The Court, having made its ruling prior to the introduction of evidence by the People, granted petitioner's counsel permission to excuse all of his witnesses regarding the matters which petitioner contended should be raised, and further stated that petitioner could make his offer of proof without the necessity of the witnesses being present. This was done with the express consent of the People [Tr. 48-49, 57]. The petitioner excused his witnesses, and after the People rested, the petitioner then made the following offer of proof:

A. Testimony of Petitioner (Offer of Proof Thereof).

1. That the petitioner, Ervin Rahmoeller, leased the premises of 2013 Redondo Beach Boulevard for the operation of a dairy, consisting of approximately 180 cows; that he had a lease on the premises, which was in existence prior to the enactment of the ordinance in question; that this lease expires on April 1, 1967; that

the monthly rent was $400, plus another $1,200 per year for one-half of the property taxes [Tr. 49].

2. That the leased premises have a 40-cow barn, which is used for milking cows; that this barn is specifically designed and constructed as a cow barn and has no other use; that the barn has a cement base, designed for the milking of cows; that there are special electrical units affixed to the barn for milking machines; that there are special partitions and stalls for the milking of 20 cows on each side of the barn facing each other [Tr. 49-50].

3. That there was a storage stand tank processing, warming, cooling, and pasteurization on the premises, together with corrals and fences specially built and designed for dairies, which would have no other purpose or value [Tr. 50].

4. That the reasonable remaining life for the physical improvements upon the dairy would be estimated at another 7 to 10 years from the date of the trial, to wit, January, 1965 [Tr. 50].

5. That in order to duplicate the leasehold premises at some other location, the rental would be $800 per month [Tr. 50].

6. That the petitioner purchased 180 cows for $108,000, or $600 per cow; that the market value of the cows varies depending upon whether there is a milk contract [Tr. 50]; that if you sell the cow without a milk contract, the value of a cow is only $250 to $300; however, with a milk contract, such as petitioner had, the fair market value is approximately $600 per cow [Tr. 51].

7. That in the event that petitioner's lease is terminated by the ordinance, petitioner's milk contract is likewise terminated [Tr. 52].

8. That the petitioner purchased the leasehold and cows for $108,000, payable $18,000 down and the balance on a chattel mortgage; that over the last 7 years petitioner had reduced the balance of the chattel mortgage to $60,000 [Tr. 54].

9. That the reasonable value of the corrals, the cement drains, and the barns at the present time is approximately $35,000 [Tr. 55].

10. That the reasonable value of the loss of the milk contract prorated over the life of the lease is approximately $27 per year per cow for the remaining period of the lease after December 1, 1963 to April 1, 1967 [Tr. 55].

11. That during the past 13 months petitioner had looked at some 15 to 20 dairies in an attempt to move his dairy, and that he was unable to locate a dairy with milk contract which is within his financial means; that without a milk contract, he must sell his milk as surplus milk, which have very little value [Tr. 53].

12. That petitioner has invested in excess of $10,000 in milking equipment, electrical equipment and fixtures, which are attached to the dairy premises and cannot be removed [Tr. 68].

13. That outside of the investment in the dairy business, petitioner's total net worth does not exceed $3,000 [Tr. 68].

B. Expert Testimony—Robert McCune (Offer of Proof Thereof).

1. That in addition to petitioner's testimony, an expert by the name of Robert McCune, located in Norwalk, who has been in the dairy business for 20 years and who has been selling real estate, primarily dairy operations, for the same period of time, and who is familiar with the Gardena Dairy and is also a member of the Milk Control Board, would testify to substantially the same as the petitioner regarding the remaining value of the premises, the value of the cows, without the milk contract, and the reasonable monthly replacement value of a similar leasehold [Tr. 63-65].

This testimony was to be introduced by way of defense to show that the period of time established by the City Council of five years was arbitrary, capricious, unreasonable and discriminatory, and that the ordinance was unconstitutional in that it attempts to deprive petitioner of his property without due process of law.

Petitioner further attempted to introduce testimony to the effect that the operation of the premises was not a nuisance, and in support of this, petitioner offered the following witnesses:

1. The petitioner [Tr. 51-52].

2. Fred Stevens, realtor, residing next door at 1927 Redondo Beach Boulevard [Tr. 58].

3. Ernest Bunten, dairy inspector for Los Angeles County Health Department [Tr. 49].

4. Rev. R. Murray Jones, pastor of the First Presbyterian Church in Gardena, located immediately next door to the dairy [Tr. 60].

5. George Liebsok, who operates auto shop at 1928 Redondo Beach Boulevard in Gardena [Tr. 60].

6. Mrs. John Lack [Tr. 61].

7. Walter L. Wilson, chief of the dairy division in Los Angeles with the State Department of Agriculture and Supervisor of Gardena [Tr. 65].

8. Mr. Hausenbuiller, deputy to Walter L. Wilson [Tr. 66].

The Court rejected the entire offer of proof on the grounds that it was immaterial, and the petitioner rested.

The Court ruled as a matter of law that the ordinance was constitutional and would not permit the introduction of evidence by petitioner as to the question of fact of whether or not the five-year period of amortization set forth in the ordinance was reasonable [Tr. 33-44].

The Court ruled that the only issue, therefore, before the jury was whether or not petitioner maintained cows on his premises after December 1, 1963 [Tr. 82].

Petitioner was found guilty [Tr. 84]; sentenced to six months in the County Jail and fined $500. Execution of sentence was suspended pending appeal, and petitioner placed on probation for a period of three years on condition that he remove the cows on or before March 1, 1965 [Tr. 88].

Following petitioner's exhaustion of appeal to the Superior Court, in and for the County of Los Angeles, the petitioner again appeared before the South Bay Municipal Court for resentencing on August 12, 1965, and was sentenced as noted above with the exception that the condition of removing the cows was now set for October 1, 1965. For purposes of submission of this writ of certiorari, the South Bay Municipal Court on September 29, 1965 extended the compliance to October 8, 1965 (extension of time attached hereto).

How the Federal Questions Were Presented and Decided.

Throughout the proceedings petitioner has maintained that his prosecution and alleged violation of the instant ordinance was unconstitutional and consisted of the following, to wit:

1. That the petitioner was prosecuted by an unconstitutional ordinance; and

2. By a means denying him due process of law.

Reasons for Granting the Writ.

This case involves substantial questions affecting important constitutional rights, resolved by the Court below in conflict with principles expressed by this Court.

ARGUMENT.

I.

The Petitioner Has Been Prosecuted and Convicted for Violation of a City Ordinance Which Rezoned a Dairy Out of Business; the Constitutionality Was Challenged Because the Period of Time Allowed by the City for the Amortization of the Improvements Thereon Was Unrealistic, Arbitrary and Unreasonable; and Furthermore, Petitioner Was Denied the Opportunity to Introduce as Part of His Defense, Evidence Regarding the Remaining Life Use of the Said Improvements.

Under the Fourteenth Amendment to the United States Constitution and Article I, Section 13 of the California Constitution, a defendant is guaranteed due process of law in prosecutions by the state. This is true regardless of how one classifies an ordinance, *i.e.*, be it classified as a zoning ordinance, or a penal statute. To divest an individual of his property against his consent, every substantial requisite of the law must be shown to have been complied with. *Ronkendorff v. Taylor's Lessee*, 29 U.S. 349, 7 L. Ed. 882 (1830). To hold otherwise is a denial of due process of law. The petitioner herein has sought to raise by defense the constitutionality of the ordinance and the unreasonableness of the remaining life use of the improvements, but was denied the opportunity to put on evidence of this fundamental defense [Tr. 33-44]. The petitioner sought to raise the defense that the five-year amortization period set forth in the ordinance was arbitrary and unreasonable [Tr. 3-5, 10-12, 28-30, 47, 49-57]. The trial court summarily ruled that the period determined by the City Council

was conclusive, and refused to permit petitioner the right to introduce any evidence of the remaining life use of the improvements [Tr. 33-44].

It has long been recognized that zoning regulations in order to be valid must bear a substantial relationship to public health, safety, morals or general public welfare. *State of Washington, ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 73 L. Ed. 210, 49 S. Ct. 50 (1928). It must likewise be recognized that in determining the validity of an ordinance which rezones a valid pre-existing use out of business, the constitutionality of such an ordinance can only be determined by all the surrounding circumstances. *Robertson v. City of Salem,* 191 F. Supp. 604 (1961); *Morris v. City of Los Angeles,* 116 Cal. App. 2d 856, 254 P. 2d 935 (1953); *Livingston Rock and Gravel v. County of Los Angeles,* 43 Cal. 2d 121, 272 P. 2d 4 (1954); *Gage v. City of Los Angeles,* 127 Cal. App. 2d 442, 274 P. 2d 34 (1954). It is for these reasons that the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 13 and 14 of the California Constitution have been held to provide guarantees that a zoning ordinance cannot unfairly be discriminatory, unreasonable, nor arbitrary.

The ordinance herein provided for a five-year amortization period within which time petitioner was to cease doing operations on his premises. Therefore, it is necessary to consider the facts and circumstances of petitioner's dairy business in reaching a decision as to whether the amortization period was a reasonable one or not. Each individual case involving a valid pre-existing use must be closely examined to determine whether the period of time is or is not reasonable. Among other things,

the petitioner was not allowed to introduce evidence of the improvements upon the said land. Petitioner was prepared to show that he would now be required to sell his dairy herd, and his milk contract would be immediately terminated; that the value of cows sold without a milk contract is less than one half the market price of cows sold with a milk contract. Such loss alone would approximate $54,000. Further, that the petitioner's improvements to the dairy facilities and equipment were valued in excess of $35,000 and had a remaining economic life of seven to ten years. The effect of the ordinance would make such improvements valueless. The aforesaid losses which will be brought about are indicative of the unreasonableness of the mere five-year amortization period.

It is submitted that if the City of Gardena, or any other municipality, in exercise of its police power, designs to "zone out" a citizen's business and livelihood, then it must do so in accordance with constitutional safeguards. If a government should exercise its power of eminent domain, then the Constitution guarantees one will be duly compensated for taking of his property. On the other hand, it is likewise settled that incidental damage to property resulting from zoning laws is not considered a taking of property for which compensation must be paid. However, if a governmental agency, under the guise of enacting a zoning ordinance, attempts to circumvent the constitutional guarantee of just compensation by rezoning a lawful existing use, such circumvention can only be avoided by permitting one to raise this question of fact as a defense to the constitutionality of the ordinance. It is this reason that has prompted this Court in the past to state that there comes a point

when police power ceases and eminent domain must be used to justly compensate the person involved. Regulations should not be pressed to a point where they would amount to a taking of property without due process of law. *Block v. Hirsh*, 256 U.S. 135, 65 L. Ed. 865, 41 S. Ct. 458 (1921).

It is submitted that the Appellate Department of the Superior Court did not adequately rule on the direct question involved herein. Instead, it set forth an enlightening distinction regarding the issue of "reasonableness" as not being a question of fact for the jury but rather a question of "constitutional fact" for the court's sole determination (Memorandum Opinion and Judgment, pp. 5-6). Said distinction completely ignores the trial court's determination that the question of reasonableness was a "matter of law" and that no evidence regarding this question was allowed to be introduced either for the Court or jury's guidance prior to the Court's ruling.

The question of reasonableness in zoning ordinances was recently discussed in an article in 50 Calif. L. Rev. at 896. Therein four situations were reviewed as regards zoning ordinances being a basis for exercise of the police power. One of such situations was the same as herein involved, *i.e.*, where the ordinance prohibits existing and established "uses" that do not constitute a public nuisance. Therein it is pointed out that ordinances providing an amortization period must be reasonable in the determination of the length of the amortization period. Otherwise, "governmental action in the form of regulation can be so oppressive as to constitute a taking that constitutionally requires compensation."

The Appellate Department of the Superior Court submitted that the trial court could have exercised the doctrine of judicial notice and determined that the findings of the *City* Planning Commission and *City* Council "were well supported" relevant to the reasonableness question (Memorandum Opinion and Judgment, pp. 8-9). Whether or not the trial court did exercise such judicial notice does not appear on the record. The Appellate Department did exercise such judicial notice and in so doing proceeded to limit the scope of the evidence upon which to "buttress" its findings as to the reasonableness question. Through the exercise of judicial notice the Appellate Department conducted its own investigation, ostensibly limiting the scope of its inquiry to the review of "findings" made by agencies of the government.

This was the only evidence which the Appellate Department referred to in reaching its determination as to the question of reasonableness. It is submitted that the doctrine of judicial notice should not be invoked where there is a key controversy as regards the existence of a factual question of "reasonableness" and upon which the validity of the ordinance ultimately rests. If a court takes judicial notice of public records, then it should not likewise take judicial notice as to the truth of all matters stated therein. *Love v. Wolf,* 226 A.C.A. 482, 38 Cal. Rptr. 183 (1964); *Beckley v. Reclamation Board,* 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1964). Furthermore, the Appellate Department, through the exercise of judicial notice, cited records representing appearance of the petitioner before the City Council of Gardena from which the Appellate Department had "inferred" that the petitioner bargained for, obtained, and

accepted a five-year period of amortization in lieu of a three-year period originally proposed. It is then stated that one who accepts the benefits of a statute, even if it be unconstitutional, is estopped from later questioning its constitutionality. It must be stressed that we are not dealing with an abstract principle of law. To sustain a conviction solely upon the basis of conclusions drawn from records which are not a part of the criminal proceeding is tantamount to a summary proceeding, whereby the defendant is not confronted by his accusers, nor permitted to examine the evidence and witnesses for the prosecution.

It was suggested by the Appellate Department that the petitioner could have obtained judicial ruling on the issues involved, through the exercise of mandamus proceedings, by certiorari, injunction, declaratory relief, or writ of prohibition. Be this true or not, the crucial fact remains that this is a criminal prosecution, and the petitioner has been found guilty and currently faces a jail sentence. In the instant case the Appellate Department has in effect stated that petitioner could raise the issue of reasonableness and challenge the constitutionality of the ordinance in a civil proceeding, but that such challenge is not available as a defense in a criminal prosecution. Such rationale is clearly contrary not only to the law of this state but also to the dictates of fairness and justice. Petitioner has challenged the constitutionality of the ordinance under which he was prosecuted but has not been afforded his day in court in this respect. In the case of *People v. Amdur,* 123 Cal. App. 2d Supp. 951, 267 P. 2d 445 (1954), the appellant was convicted of the violation of an ordinance of the city of Berke-

ley. He there contended that the ordinance in question was unconstitutional. Therein, the Court stated:

> "The fact that an ordinance is unconstitutional as written * * * or that it has been unconstitutionally applied is always available as a defense to a prosecution for the violation thereof, and it is in this connection that the trial court committed error which necessitates a reversal."

The Appellate Department further drew heavily upon various rulings in *civil* proceedings, raising the inference that the petitioner waived his right to question the constitutionality by not raising the issue through injunction, etc., at an earlier moment, or otherwise electing to pursue one of the prementioned civil remedies as suggested by the Appellate Department. Such an analogy can have no application to a criminal prosecution. Furthermore, the mere fact that equity may intervene to prevent discriminatory enforcement of an ordinance or enforcement of an unconstitutional ordinance is not a prerequisite to a party's squarely raising the constitutional defense in objection to a criminal prosecution. *People v. Harris,* 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960).

The prosecution duly pointed out that a presumption of validity exists in respect to legislative and quasi-judicial enactments of which the ordinance is a part. However, the Court has in effect made such a presumption a conclusive one by refusing to allow the petitioner to put on evidence to overcome such presumption. It is submitted that if such a presumption exists, then it is subject to rebuttable evidence, and whether the amortization period under the ordinance is a reasonable one, and

constitutional, must depend upon the facts and circumstances of each individual case, with due consideration given to the type of business involved, whether the business is also in fact a public nuisance, and the purpose for which the ordinance was enacted in light of public policy. *Morris v. City of Los Angeles,* 116 Cal. App. 2d 856, 254 P. 2d 935 (1953); *Livingston Rock and Gravel v. County of Los Angeles,* 43 Cal. 2d 121, 272 P. 2d 4 (1954).

The appellate Department further submitted that had the proffered testimony submitted on behalf of the petitioner been allowed into evidence, then it "at most" could only have created a conflict in the evidence, and such would not have been sufficient to disturb the legislative determination. It is submitted that such a conclusion reflects prejudgment of the petitioner's contentions without giving the petitioner his day in court to present his viewpoint. Since in fact petitioner's evidence was not allowed in, then how could it be determined what weight the trial court would have given to such conflict? Whether the evidence proffered by the petitioner is sufficient to overcome any presumption or other evidence submitted on behalf of the prosecution, should only be resolved after weighing all the evidence and circumstances of each individual case. To hold otherwise is a clear denial of due process of law. Due process requires that there by an opportunity to present every available defense. *American Surety Co. v. Baldion,* 287 U.S. 156, 77 L. Ed. 231, 53 S. Ct. 98 (1932).

Conclusion.

Wherefore, for the following reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAMS & WILLIAMS,
Attorneys for Petitioner.

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PEOPLE OF THE STATE OF CALIFORNIA.

VOLUME II.

Appendix to Petition for a Writ of Certiorari to the Superior Court of the State of California, in and for the County of Los Angeles.

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Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Gardena Dairy Farms, et al, Defendants, Irvin Rahmoeller (true name Ervin Rahmoeller), Defendant and Appellant. Superior Court No. CR A 6222. Trial Court No. M 59687.

Appeal by defendant Ervin Rahmoeller from judgment of the Municipal Court of the South Bay Judicial District, William B. Keene, Judge. Affirmed.

For Appellant—Messrs. Ernest George Williams and James J. Williams.

For Respondent—Evelle J. Younger, District Attorney, Harry Wood, Deputy District Attorney.

Defendant Rahmoeller appeals from the judgment pronounced against him for a violation of Gardena City Ordinance No. 482 (as adopted November 13, 1958), a misdemeanor, following a conviction by a jury in a trial by jury.

Rahmoeller is not the owner of the land or buildings and permanently affixed equipment on the premises commonly known as 2013 Redondo Beach Boulevard, in the City of Gardena, which are the premises in question; he holds a leasehold interest scheduled to expire April 1, 1967, as a lessee (sub-lessee according to his brief) of said premises. Both prior and subsequently to the cutoff date of December 1, 1963, he continuously owned and maintained a herd of approximately 180 cows, on a R-1 portion of an area zoned R-1 and C-3, which was a nonconforming use until said cutoff date.

Defendant was convicted for violating that portion of the zoning ordinance which provided in Section 2 thereof:

> "That from and after December 1, 1963, it shall be unlawful for any person, partnership or corporation, as principal, agent, employee, or otherwise, to maintain or cause to be maintained or kept upon any premises in the City of Gardena, any bulls, steers, cows, calves or any bovine animal of any kind."

The case, therefore, is not one dealing with a violation of the usual type of criminal ordinance, but one that concerns a criminal sanction for the purposes of enforcing a zoning ordinance prescribing a five-year period of amortization for the termination of a nonconforming use. A condition of the summary probation granted defendant was "all bulls, steers, cows and bovine animals kept upon the premises located at 2013 Redondo Beach Boulevard in the City of Gardena, are to be removed in their entirety on or before, but not later than, March 1, 1965." It is distinguishable, therefore, from a constitutional attack upon a normal police ordinance such as that considered in *People v. Amdur* (1954) 123 Cal. App. 2d Supp. 951, cited and relied upon by the appealing defendant.

The trial court dismissed the action as to defendant Gardena Dairy Farms, a corporation, when it developed in course of trial that its operations were confined to the maintenance of a store selling dairy products on the front of the premises in question, and that the herd was owned and maintained by defendant Rahmoeller, who had no financial interest in said co-defendant corporation.

Rahmoeller formally assigns as errors the following:

1. He was prejudiced by the trial court's forbidding his introduction of evidence before the jury that the five-year period of amortization was unreasonable, arbitrary and discriminatory.

2. As he was being prosecuted for a public nuisance, the prosecution should have been laid under Penal Code Section 370 instead of under the ordinance.

3. A local municipality is acting *ultra vires* where it declares an industry operating in conformance with state regulation and under state supervision a public nuisance.

4. The prosecution has the burden of proving the reasonableness of the five-year amortization period as a part of the *corpus delicti* of the offense charged against him.

Appellant Rahmoeller first raised the issues of preemption and constitutionality that envelope the grounds of error assigned by motions to dismiss, prior to the selection of the jury. The motions were denied.

Aside from appellant's claim that the ordinance was invalid as local legislation intruding into areas covered and preempted by state-wide statutes, the nub of his grievance is that he was denied a collateral attack on the constitutionality of the legislative action of the City Council of the City of Gardena in finding as set forth in Section 1, inter alia, that the maintenance of a number of bovine animals within the city limits was a nuisance and that a five-year period was a reasonable amortization period within which to terminate defendant's nonconforming use of operating a dairy and maintaining a herd of approximately 180 cows at 2013 Redondo Beach Boulevard, in the City of Gardena.

Appellant sought to execute his collateral attack by producing witnesses who would testify before the jury relative to the questions of whether defendant's dairy operation was conducted in a manner to constitute a nuisance and whether the five-year period of amortization was reasonable; and then to have the jury determine the issue of constitutionality, which the trial judge forbade.

Assignments of error labelled 2 and 3 above are predicated upon a theory of preemption by the State. These may be answered that this action is not a prosecution for a public nuisance *per se*. The declaration by the City Council in Section 1 of the ordinance that "the maintenance of animals as aforedescribed (any numbers of bulls, steers, cows, calves or any bovine animals within the city limits) is a public nuisance" is merely one of those incidental or foundational facts upon which the City Council predicated its legislative judgment that the five-year period of amortization of the nonconforming use was reasonable. The mere fact that nuisance is a factor in the enactment of zoning ordinances does not convert litigation based on the ordinance into one for the abatement of a public nuisance. (See: *Jones v. City of L.A.* (1930) 211 Cal. 304, 316; *Livingston Rock and Gravel Co. v. County of L.A.* (1954) 43 Cal.2d 121, 125.)

Provided that it meets the constitutional test of reasonableness, a municipality can adopt zoning ordinances rendering it impossible to conduct a business or industry which is not in and of itself a nuisance, where changing conditions of the community render it necessary or advisable in the interests of health, safety, and public welfare. (*City of L.A. v. Gage* (1954) 127 Cal.

App.2d 442, 451, 453; *Miller v. Bd. of Public Works* (1925) 195 Cal. 477, 487.)

Whether or not a certain use of land constitutes a public nuisance is only one factor to be weighed in determining what is a reasonable period for amortizing a nonconforming use of that land. A rezoning regulation constitutionally may provide for an immediate termination of a nonconforming use if a planning commission upon a public hearing, held upon notice, finds the nonconforming use to be "detrimental to the public health or safety, or so as to be a nuisance" (*Livingston Rock etc. Co. v. County of L.A.* (1954), *supra*, 43 Cal.2d 121, 128. See also: *Hadacheck v. Sebastian* (1915) 60 L.ed 348, 356-357 (239 U.S. 394) affirming *Ex parte Hadacheck* (1913) 165 Cal. 416.)

The trial judge correctly ruled that reasonableness of the five-year amortization period was neither a part of the *corpus delicti* nor a question for the jury. In *Wigmore on Evidence* (3rd ed.) Vol. IX, Sec. 2555 (d), p. 522, we find that:

> "Where a LEGISLATIVE ACT is argued to be UNCONSTITUTIONAL, and *this is to depend upon the unreasonableness,* or lack of possible reasonableness, of the law in its purpose or operation, and thus the external facts furnishing the possible legislative motive or the possible actual effect must be considered, *this incidental question of fact is not for the jury, but for the Court.* Hence, no testimony, of experts or others, would be admitted for the jury." (Emphasis by italics added.)

Appellant's counsel in contending that "reasonableness is a question of fact" fails to recognize that this

is not the ordinary question of fact, but is what Justice Tobriner characterizes as "a constitutional fact" (*Zeitlin v. Arnebergh* (1963) 59 Cal.2d 901, 910) which "is a question of fact mixed with a determination of law". And when we speak in the context of what are the respective functions of judge and jury, such questions of "constitutional facts" are a question of law for the Court and not for the jury.

It has been well established that the question of the constitutionality of a statute is a question for the court and not for the jury. (*People v. Love* (1921) Sup.Ct. Ill., 131 N.E. 809, 811 (298 Ill. 304, 16 ALR 703); *Sisson v. Buena Vista County* (1905) 104 N.W. 454, 458, 461 (128 Iowa 442); and see: *Zeitlin v. Arnebergh, supra,* 59 Cal.2d 901, 908-909; 16 Am.Jur.2d (Const. Law) Sec. 171, p. 338.) In California it has been held that the rules of construction of statutes apply to the construction of ordinances (*Evola v. Wendt Construction Co.* (1959) 170 Cal.App.2d 21, 24) and that the construction of an ordinance is for the court and not for the jury (*Reid & Sibell v. Gilmore & Edwards Co.* (1955) 134 Cal.App.2d 60, 72). It has been said that "(t)he *constitutionality* and construction of a statute are matters of law" (*People v. Kaufman* (1920) 49 Cal.App. 570, 572) and Penal Code Section 1124 provides that matters of law arising in the course of a criminal trial are for the court to decide.

Courts in other states have held also that the question of the reasonableness of a zoning ordinance within the framework of judge and jury functions constitutes a question of law for the court and not for the jury. (*Long v. City of Corpus Christie* (1958) Ct. of Civ. App., Texas, 315 S.W.2d 24, 27, 28, 30; *City of Dallas*

v. Rosenthal (1951) Ct. of Civ.App., Texas, 239 S.W. 2d 636, 647; *Duggins v. Bd. of County Com'rs.* (1956) 293 P.2d 258, 259, 261, 262 (179 Kan. 101); *O'Connor v. City of Moscow* (1949), Sup.Ct. of Idaho, 202 P.2d 401, 405, (69 Ida. 37).)

The ruling of the trial judge in denying the motions to dismiss before the offer of any evidence was proper, in view of the presumption of the validity of legislative and quasi-judicial actions which requires no extensive citations of authority.

Defendant Rahmoeller's request to have the jury decide whether his dairy and herd maintenance operations constituted a nuisance and whether the five-year period was a reasonable period of amortization, in the light of the foregoing authorities, is not supported by the law.

This is adequate to affirm the judgment below within the legal framework in which this appeal comes before us. However, because of gravity of the questions involved (the welfare of the public in the City of Gardena and the size of the amount claimed to be invested by defendant), we have proceeded further to satisfy ourselves that defendant Rahmoeller is not being unfairly deprived of his day in court to have a judicial determination of his claim of unconstitutionality of the ordinance on the theory that the five-year period of amortization was unreasonable.

We have further concluded that the trial judge was correct in denying the motions to dismiss as a matter of law upon the Gardena City Attorney calling to his attention matters of which he is permitted to take judicial notice. This legislation was grounded upon the authority granted the City Council of the City of Gar-

dena under Govt. Code Sections 65800 and 65807. Since the defendant has no interest in the permanent structures and improvements which normally call for an extended period of amortization and his interest is only that of a lessee (or sublessee as his counsel terms him in his brief), the court noting only what is contained in the four corners of Ordinance No. 482 could quite properly have concluded that the ordinance was valid as a matter of law in light of such cases as: *City of L.A. v. Gage* (1954), supra, 127 Cal.App.2d 442 (five-year amortization of a wholesale and retail plumbing business held constitutional), *In re Hadacheck* (1913), supra, 165 Cal. 416, aff'd. *Hadacheck v. Sebastian* (1915), supra, 239 U.S.394, 60 L.ed. 348 (ordinance prohibiting a pre-existing brickmaking business following a finding that it was a nuisance upheld); *Livingston Rock etc. Co. v. County of L.A.* (1954), supra, 43 Cal.2d 121 (immediate termination upon planning commission hearing on notice that operation was a nuisance held constitutional where plant cost of $18,000.00 and $80,000.00 worth of mixer trucks were involved); *Spurgeon v. Bd. of Com'rs.* (1957) 317 P.2d 798, 806 (181 Kan. 1008) (2-year amortization for removal of automobile wrecking business held reasonable; building and fixtures worth $18,000.00 and moving expenses $4,500.00); *Standard Oil Co. v. City of Tallahassee* (1950) CCA 5th, 183 F.2d 411, cert. den. 340 U.S. 892 (10-year amortization of gasoline service station upheld); *City of Seattle v. Martin* (1959) Sup.Ct. Wash., 342 P.2d 602 (54 W.2d 541) (1-year period to discontinue use of a lot for repair of construction equipment upheld); and *State ex rel. Dema Realty Co. v. McDonald* (1929) 121 So. 613, 616, 617 (168 La. 172), cert. den. 280 U.S. 556 (1-

year period to terminate nonconforming use of small drug store upheld). And the court probably noted that actually 6 years, 2 months, and 5 days had elapsed from the date of adoption of the ordinance to the date of trial.

The trial judge by judicial notice could have noted that the findings of "nuisance" and "reasonableness" of the five-year period in Section 1 of the ordinance were well supported. He could have taken judicial notice of the records of the City Planning Commission disclosing consideration of the issues defendant seeks to raise again. These records are kept pursuant to the mandate of the law. (*Watson v. Los Altos School District* (1957) 149 Cal.App.2d 768, 772-773; Govt. Code Sec. 65402; Gardena Municipal Code Sec. 10-1.07). The public records of the City Council concerning the passage of this ordinance, including the many complaints from inhabitants of Gardena on file therein, are also subject to judicial notice. The trial court was entitled to take judicial notice of what is general knowledge within the limits of its territorial jurisdiction (*People v. Tossetti* (1930) 107 Cal.App. 7, 10); of the increase in population (*In re Simpson* (1923) 62 Cal. App. 549, 555; *People v. Spring Valley Co.* (1952) 109 Cal.App.2d 656, 663); of such things as the need for redevelopment (*Redevelopment Agency v. Hayes* (1954) 122 Cal.App.2d 777, 806); and that the councilmen had personal knowledge of the physical condition of the premises concerned and the neighborhood characteristics, which constituted independent evidence in support of their findings (*Siller v. Bd. of Supervisors* (1962) 58 Cal.2d 479, 484). Even if the trial court did not in fact take judicial notice of the things

or items noted above, this court upon review can do so and give proper effect to such facts subject to judicial notice. (*Taliaferro v. County of Contra Costa* (1960) 182 Cal.App.2d 587, 592; *People v. Tossetti* (1930), supra, 107 Cal.App. 7, 13.)

Against these judicially noticed facts buttressing the findings of the City Council, the evidence proffered by the defendant at most could only have created a conflict in the evidence (assuming arguendo that a municipal court is a proper forum for reviewing the validity of legislative action adopting a zoning ordinance; it certainly has no jurisdiction to issue an injunction pertinent to this case or extraordinary writs mentioned above (C.C.P. Sec. 89)) in face of the well-established law that a person attacking the reasonableness of a zoning ordinance has the burden of proving his claim (*National Advertising Co. v. County of Monterey* (1962) 211 Cal.App.2d 375, 381; *City of L.A. v. Gage* (1954), supra, 127 Cal.App.2d 442, 450) and that where "the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed" by the courts. (*Hamer v. Town of Ross* (1963) 59 Cal.2d 776, 783; *Consolidated Rock etc. Products Co. v. City of L.A.* (1962) 57 Cal.2d 515 522-523; *Anderson v. City Council* (1964) 229 Cal. App.2d 79, 91, and *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338-339.)

Further in this case the Gardena Dairy Farms was notified by letter from the Gardena City Attorney dated March 29, 1963, and delivered March 30, 1963, that bovine animals had to be removed from the premises at 2013 Redondo Beach Blvd., by December 1, 1963, by terms of Ordinance No. 482. Thereafter, the Gar-

dena Dairy Farms through its attorneys requested an extension of the amortization period beyond December 1, 1963. The City Council held a hearing, upon notice, to act upon the application for extension at which defendant Rahmoeller was present in person and with counsel (the same counsel as that for Gardena Dairy Farms), and then denied the application. Defendant Rahmoeller further received a written notice of this denial of extension on November 30, 1963, from the Gardena City Attorney; and the letter notice further reiterated notice to remove the "cows, cattle and other bovine animals . . . by midnight, December 1, 1963".

Following this adverse decision of the City Council and notice of its action, defendant Rahmoeller failed to take any steps (as his counsel on oral argument admitted) open to him on direct appeal or review, whereby he could have obtained a judicial ruling on the issues now sought to be raised by him, by mandamus (*Siller v. Board of Supervisors* (1962), supra, 58 Cal.2d 479), by certiorari (*Livingston Rock etc. Co. v. County of L.A.* (1954), supra, 43 Cal.2d 121, 128), by injunction (*Metcalf v. County of L.A.* (1944) 24 Cal.2d 267), or by declaratory relief (*Consolidated Rock etc. Co. v. City of L.A.* (1962), supra, 57 Cal.2d 515) if the action of the City Council is considered legislative action.

On the other hand, if the denial of extension is deemed a quasi-judicial action then according to *Fascination, Inc. v. Hoover* (1952) 39 Cal.2d 260, 265 and *Jenner v. City Council* (1958), 164 Cal.App.2d 490, 499-500, defendant is barred from introducing at a judicial review hearing evidence not presented to the quasi-judicial body.

But in any event, defendant Rahmoeller took no action until the criminal complaint in this action was filed against him on August 24, 1964, eight months and six days later. Even at that late date, if he were sincere in his belief of unconstitutionality, he could have sought judicial review and relief by a writ of prohibition in the superior court with a direct line of appeal to the highest court of this state (*Alves v. Justice Court* (1957) 148 Cal.App.2d 419), but for reasons best known to him and his counsel he chose not to do so.

It has been held in other states that where one fails to take an available direct appeal from a denial of an extension of the period of a nonconforming use, he cannot raise the issue of constitutionality of a zoning ordinance by collateral attack in a criminal misdemeanor action in a court of limited jurisdiction. (*Iannella v. Johnson* (1948) Sup.Ct. of N.J. 56 A.2d 894, 896 (136 N.J. Law 514), aff'd. 61 A.2d 237 (137 N.J. Law 659), appeal dismissed 336 U.S. 932, 69 S.Ct. 749, 93 L.ed. 1092; and see: *Commonwealth v. DeBaldo* (1951) 82 A.2d 578, 580-581 (169 Pa. Super. 363); cf. *Laque v. State* (1955) 113 A.2d 893, 897 (207 Md. 242) cert. den. 350 U.S. 863, 76 S.Ct. 105, 110 L.ed. 765.) There are good policy reasons behind such a rule which appears to have some recognition in California. (See *Zeitlin v. Arnebergh* (1963), supra, 59 Cal.2d 901, 907.) Where the welfare of a large number of people are affected and the amounts of property and investment involved exceed greatly the jurisdiction of the trial court, it would appear to be good public policy to have

the issue of constitutionality of a zoning ordinance litigated in a court of general jurisdiction with a direct line of appeal to the highest court of the state.

Some of the same policy considerations are probably behind another rule that pertains to the various civil remedies which were open to the defendant, and that is that in civil proceedings, the general rule is that the question of the constitutionality of a statute or an ordinance must be raised at the earliest possible moment, or else it is deemed waived. (*Jenner v. City Council* (1958), supra, 164 Cal.App.2d 490, 498; *Preston v. Municipal Court* (1961) 188 Cal.App.2d 76, 82; *Hershey v. Reclamation District* (1927) 200 Cal. 550, 564; 11 Cal.Jur.2d 404.)

The City Council records further reflect that an attorney, Sidney Bleifeld, representing both the Gardena Dairy Farms and the Meadow Park Dairies presented defendant's side of the case before the City Planning Commission on August 19, 1958, and then appeared before the City Council of the City of Gardena on October 14, 1958, when it was conducting a hearing with reference to the adoption of the five-year amortization period. The records reflect that he stated in part at that time:

> ". . . with reference to the proposed Ordinance pronouncing the 'death sentence', *a period of five years is more reasonable than the original three years proposed.* However, the existing leases on the two dairies should be taken into consideration, which in one instance is for eight years. . . ." (Emphasis added.)

From this it may be inferred that the Gardena Dairy Farms had bargained for and obtained a five-year period in lieu of the three-year period originally proposed, and having received this five-year reprieve they accepted its benefits and took no further action towards a judicial determination. One who accepts the benefits of a statute, even if it be unconstitutional, is estopped from later questioning its constitutionality (*Higbie v. County of L.A.* (1941) 47 Cal.App.2d 281, 289; *Hershey v. Reclamation District* (1927), supra, 200 Cal. 550, 564; 11 Cal.Jur.2d 405; and see: *County of Sacramento v. City of Sacramento* (1946) 75 Cal.App.2d 436, 447-449), which in this case defendant sought to do by collateral attack in a court of limited jurisdiction 6 years, 2 months and 5 days after the adoption of the ordinance and under which it received sanctuary for five years. It will be approximately six years and nine months when the judgment of this court becomes final. Defendant Rahmoeller made no representation that he did not have notice of the proceedings leading to the adoption of the ordinance in question nor of its contents which were published in the Gardena Valley News as was required by Govt. Code Section 50021.

We conclude, therefore, that defendant Rahmoeller has not been unfairly deprived of his day in court in which to litigate the issues of constitutionality and reasonableness of the amortization provisions of Ordinance 482 the City of Gardena, and its section 2 under which he was convicted. The economic detriment to the

defendant is regrettable but it is the usual concomitant with almost every exercise of the police power as appellate courts have reiterated in their opinions ever since zoning law litigation has become common.

The judgment is affirmed.

Dated July 22, 1965.

Aiso, *Presiding Judge*

We concur:

Faries, *Judge*

Breitenbach, *Judge*

END